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Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—against—

OPERA ON TOUR, INC.,

Respondent.

PETITION FOR RE-HEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

WILLIAM MACY,
Attorney for Petitioners.

Hallsby Press Inc.—NYC

INDEX

PAGE

Petition for Rehearing of Petition for Writ of Certiorari to Court of Appeals 1

Statement of Facts 1

Grounds for Rehearing 2

Statement by Counsel 4

Brief in Support of Petition for Rehearing 5

Point I

The New York Court of Appeals necessarily decided the federal question presented by the petition for certiorari; and the judgment of the Court of Appeals could not have been given without deciding that question 5

Conclusion 12

AUTHORITIES CITED

	PAGE
American Federation of Labor v. Swing, 312 U. S. 321, 324	6
American Guild of Musical Artists v. Petrillo, 286 N. Y. 226, 232	7
Brown v. Atwell, 92 U. S. 327	9
Dorchy v. Kansas, 272 U. S. 306, 311	8
Enterprise Irr. Dist. v. Farmers' Mut. Canal Co., 243 U. S. 157, 164	11, 12
Fourteenth Amendment of Constitution of United States	7, 8, 9
Honeyman v. Hanan, 300 U. S. 14, 21	9, 11
Lynch v. N. Y. ex rel. Pierson, 293 U. S. 52	10
Section 876 (a) of the New York Civil Practice Act	10
Wohl v. Bakery & Pastry Drivers Union, 284 N. Y. 788 amended remittitur 285 N. Y. 483	7, 9, 10

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Petitioners,

—against—

OPERA ON TOUR, INC.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement of Facts.

1. This Court on October 13th, 1941, in denying a writ of certiorari to the New York Court of Appeals said:

> "It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals. The petition for writ of certiorari is denied. Lynch v. N. Y. ex rel. Pierson, 293 U. S. 52; Honeyman v. Hanan, 300 U. S. 14, 18."

2. Petitioners thereupon applied to the New York Court of Appeals for a certificate that that Court necessarily decided said federal question, to wit, whether the injunction

issued in this case violated the freedom of speech and freedom of assembly guaranteed by the Fourteenth Amendment to the United States Constitution, or, in the alternative, for a reargument of petitioners' previous application to that Court for a reargument of the appeal, and in the event of the denial of such rehearing, for an amendment of its remittitur.

The New York Court of Appeals denied that application without opinion on November 27th, 1941.

3. This Court on November 1, 1941, extended petitioners' time to make the present application for a rehearing until twenty-five days after the determination by the New York Court of Appeals of petitioners' said application for such certificate.

4. Respondent's only production was the opera "Faust" (R. 16, 74), and its only grievance is that it was obliged to discontinue such production because the stagehands withdrew their services and refused to continue any further services for the reason that respondent used mechanized music in place of living musicians.

There was no attempt to dispute petitioners' good faith, absence of malice, fraud, force, coercion or intimidation of any kind, nor of petitioners' honest belief that their acts were necessary for the protection of the employment opportunities of their members in furtherance of their economic interest in the continued employment of those in allied trades, and to prevent increases in their already largely unemployed ranks (R. 89, 140, 423, 424, 432, 462, 721).

Grounds for Rehearing.

A. The New York Court of Appeals did necessarily decide the federal question presented by the petition to this Court for a writ of certiorari.

B. The judgment of the New York Court of Appeals could not have been given without deciding such federal question.

The petition for rehearing should be granted, and on such rehearing the writ of certiorari granted.

Dated: New York, December 17th, 1941.

JOSEPH N. WEBER,
Individually and as President of American Federation of Musicians.
GEORGE E. BROWNE, individually and as President of International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada.

By WILLIAM MACY,
Attorney for Petitioners,
521 Fifth Avenue,
New York City, N. Y.

Statement by Counsel.

WILLIAM MACY, counsel for the petitioners herein, certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated, New York City, December 17th, 1941.

WILLIAM MACY,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 295

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—against—

OPERA ON TOUR, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

The New York Court of Appeals necessarily decided the federal question presented by the petition for certiorari; and the judgment of the Court of Appeals could not have been given without deciding that question.

The prevailing opinion in the Court of Appeals states (R. 1274):

> "The only issue is whether the leaders of the defendant unions were engaged in promoting 'a lawful labor objective' when the Musicians' Union induced the Stagehands' Union to join in a combination, to destroy an enterprise solely because of the use of machinery in the production of music in place of the employment of live musicians."

Also (R. 1279):

> "In other words, there is involved in the case at bar solely the demand that a new enterprise shall not make use of machinery in order to create places for live musicians."

However, the injunction as issued is permanent and enjoins, in unlimited terms, not only strikes and picketing, but also peaceful persuasion, even by individual musicians, of any other musician or anyone else, not to work for respondent. It thus prohibits freedom of speech and assembly and denies to petitioners equal protection of the laws in violation of the Fourteenth Amendment.

Respondent's brief to this Court in opposition to the petition for certiorari complains (p. 2) that respondent "was not given the opportunity to compete on any terms with music furnished by live musicians". The injunction allowed by the New York Court of Appeals, however, not alone gives the musicians no opportunity to compete with mechanized music, but *prohibits these musicians from competing* with mechanized music. In effect, the New York Court of Appeals displaces live music in favor of mechanized music and says that any attempt by live musicians to compete with mechanized music is an unlawful labor objective.

This Court in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 324, said:

> "But our concern is with the final decree of the appellate court. On its face the permanent injunction in that decree rested on the explicit avowal that 'peaceful persuasion' was forbidden in this case because those who were enjoined were not in Swing's employ."

The Court of Appeals thus grants this sweeping injunction because of what it says is not "a lawful labor objective,"

citing its own recent decision in *Wohl* v. *Bakery & Pastry Drivers Union*, 284 N. Y. 788, as affirming without opinion, a similar injunction prohibiting picketing because of an "unlawful labor objective." In that case the Court of Appeals later amended its remittitur so as to state that the Court necessarily passed upon the same federal question here presented, *i.e.*, violation of the Fourteenth Amendment, saying (285 N. Y. 483):

> "This Court held the injunction aforesaid did not violate the rights of freedom of speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States."

When the Court of Appeals decided the *Wohl* case, it had before it the case at bar for decision; and in the case at bar Chief Judge Lehman dissented for the specific reason that the injunction

> "constitutes an intrusion by the Court into a field from which it is excluded * * * by the Constitution."

And in the later case of *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226, 232, Chief Judge Lehman again dissented, referring to his previous dissent in the case at bar as follows:

> "For the reasons stated in my dissenting opinion in the earlier case (Opera on Tour v. Weber), I felt constrained to find that the injunction 'constitutes an intrusion by the court into a field from which it is excluded under the law of the state as formulated in an unbroken line of judicial decisions, by statute of the Legislature, and by the Constitution.' For the same reasons I cannot accept the decision there as a prece-

dent for subsequent decisions. *I must continue to refuse my sanction to an injunction which I regard as an intrusion by the court into a field from which, in my opinion, it is excluded by statute, by the Constitution of the State of New York and by the Constitution of the United States.*" (Italics ours.)

Thus it appears that the Court of Appeals' judgment is based solely on the ground that petitioners' labor objective is illegal and, on that ground alone justifies, enjoining freedom of speech and assembly guaranteed by the Fourteenth Amendment. That injunction could not, therefore, have been given without deciding that it is not in violation of the Fourteenth Amendment, and as to that Chief Judge Lehman specifically dissented.

The Court of Appeals therefore necessarily passed upon this federal question, and that directly appears from the prevailing opinion as well as the dissenting opinion in the Court of Appeals.

The respondent's quotation in its brief to this Court, page 6, from *Dorchy* v. *Kansas*, 272 U. S. 306, 311, is substantially the same quotation stated to the Trial Court (R. 122) on the proposition that the Fourteenth Amendment to the Constitution is no protection for a strike having an illegal purpose. Respondent's brief in the Appellate Division contained the same quotation from the *Dorchy* case, and respondent cited that case in its brief in the New York Court of Appeals.

In other words, respondent insisted that the injunction sought and obtained by respondent in this case does not violate the Fourteenth Amendment, and thus affirmatively contended that the Fourteenth Amendment does not apply.

However, despite the fact that the prevailing opinion in the instant case admits that "the question presented for decision is far reaching and of vital importance to the best

interests of unions, of employees, of employers and of the general public" (285 N. Y. 348, 352), the Court of Appeals declined to grant a certificate or amend the remittitur so that this nationally important question could be passed upon by this Court.

This Court in *Honeyman* v. *Hanan*, 300 U. S. 14, 21, quotes from *Brown* v. *Atwell*, 92 U. S. 327, that this Court will grant certiorari if the record shows that the federal question

> "was necessary to the determination of the case, and that it was actually decided, *or that the judgment as rendered could not have been given without deciding it*". (Italics ours.)

This Court in that case also stated that it must determine for itself whether a federal question was necessarily passed upon by the State Court; that whether a federal question was presented and decided in the State Court, was itself a federal question which necessarily rests upon an examination of the record; that the presence or absence of a certificate from the State Court, while it may aid this Court in examining the record, is not of itself controlling:

> "It cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present."

It must be apparent that where the State Court takes it upon itself to declare a labor objective unlawful, even though that objective be pursued by peaceful means, and issues a sweeping injunction preventing the discussion of such objective, a federal question is presented because the Fourteenth Amendment becomes directly involved. If the

question of the violation of the Fourteenth Amendment is not presented by this state of facts, then it was not presented in the *Wohl* case, nor could it be presented in any case. If by the simple expedient of declaring a labor objective unlawful a Court may deprive a litigant of the protection of the Fourteenth Amendment, then the Fourteenth Amendment is dead.

If any other question had been presented to the New York Court in the instant case upon which the injunction could independently have been sustained, then under the *Lynch* case the petitioners have no standing in this court.

It is respectfully submitted that upon a reconsideration of the record and a careful reading of the opinion in the Court of Appeals, this Court will come to the conclusion that the New York Court of Appeals could not have reached its decision without deciding the federal question.

As was pointed out in the original petition for certiorari, the only other question presented by the pleadings in this case was whether Section 876 (a) of the New York Civil Practice Act was applicable. The Special Term of the New York Supreme Court, the Appellate Division, and the Court of Appeals all ruled that question out of the case.

What other question then remained for the Court of Appeals to decide in arriving at the conclusion that the petitioner-unions should be prevented from speaking on the subject of the objective which they sought to obtain by admittedly peaceful means? No other question but the right of the Court to enjoin free speech where the Court did not agree with petitioner's economic views.

The New York Court decided that the legality of a labor objective must be determined by its own opinion of the economic soundness of the objective. If that Court felt that the objective was economically sound, the unions might freely speak. If unsound according to that Court's opinion, the unions may not speak.

The injunction herein restraining the unions from discussing their objective was necessarily (though not admitted by the Court) based upon the ground that such an injunction did not violate freedom of speech because the unions were not entitled to freedom of speech where they pursued an objective objectionable to that Court's economic ideas. That is the only conclusion which can be reached from a reading of this record, and that conclusion would have to be reached even if no opinion had been written by the Court of Appeals.

It is true, as this Court pointed out in the *Honeyman* case that if this federal question were not presented by the record a certificate from the Court of Appeals that it had necessarily decided the federal question would not avail the petitioners now, because the State Court cannot import into the record a question which the record itself does not disclose. It is equally true that the refusal of the Court of Appeals to grant a certificate or an amendment of the remittitur does not serve to remove from the record a federal question where it is apparent from the record that that question was the only question involved and that the Court of Appeals could not have reached its decision without necessarily deciding the federal question.

Petitioners feel, from the form of this Court's decision denying their petition for certiorari, that this Court intended to give petitioners an opportunity to make the application to the Court of Appeals referred to in this petition for rehearing.

This, the Court of Appeals has declined to do. It is submitted, with all deference to the Court of Appeals, that its refusal to certify the federal question was arbitrary, and in any event, the certificate is unnecessary.

This Court has indicated that such a refusal to certify will not prevent it from taking jurisdiction.

Thus, in *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164, this Court said:

> "* * * where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. * * * And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend*, ibid. 359, 367."

In the instant case we find the Court of Appeals saying (R. 1274): "* * * there is in the decision of the case at bar no denial of the right to strike", and then saying that the unions may not strike, *in this particular instance*, because the Court disapproved—not the method employed—but the objective sought. Although it said it did not do so, it actually did pass on the right to strike, and actually decided that the injunction issued did not infringe free speech because the unions were not entitled to freedom of speech in view of the absence of a legal labor objective. The Chief Judge of the New York Court of Appeals, in his able dissenting opinion, told the majority that by their decision they were invading the unions' rights. The refusal of the majority of that Court to meet the issue squarely, and its evasion of the real and only question presented by the record, calls for the invocation of the rule in *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164 (*supra*). The national importance of the question justifies this.

CONCLUSION.

The petition for rehearing and writ of certiorari should be granted and the judgment reversed.

Respectfully submitted,

WILLIAM MACY,
Counsel for Petitioners.